Supreme Court, U. S.
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No. 80-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
AND
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC IN OPPOSITION TO PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

(1) Should this Court grant *certiorari* where Petitioner has failed to show that the Court of Appeals' enforcement of the Board's decision is in conflict with the ruling of any other circuit court, where no constitutional question is presented, and where the Board's underlying unit determination is based upon substantial uncontraverted evidence and is fully consistent with applicable judicial and Board precedent?

PARTIES TO THIS PROCEEDING

In addition to Westinghouse Electric Corporation, Petitioner, and Respondents National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, the only other party to the underlying proceedings was the United Electrical, Radio and Machine Workers of America (UE), which appeared as *amicus curiae* in the Court below.

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OPINIONS BELOW

Petitioner's Appendix (A)-(E) sets forth the decisions of the United States Court of Appeals for the Fourth Circuit and the National Labor Relations Board which are the subjects of this proceeding.

JURISDICTION

The jurisdictional requisites of this Court have been adequately set out in the Petition.

STATUTES INVOLVED

Petitioner's Appendix (F) reproduces the pertinent sections of the National Labor Relations Act, 29 U.S.C. §158(a) (1) and (5).

COUNTER STATEMENT OF THE CASE

INTRODUCTION

Petitioner asks this Court to grant certiorari to review the *Per Curiam* decision of the Court of Appeals for the Fourth Circuit which granted enforcement of the Decision and Order of the National Labor Relations Board in 238 NLRB No. 102 (September 29, 1978), and its Supplemental Decision and Order in 240 NLRB No. 106 (February 13, 1979). In those decisions, the Board found Westinghouse to have violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5), by withdrawing recognition from Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE), and by failing to honor and apply the terms of the National Agreement between the IUE and Westinghouse and the Local Supplement applicable to the Westinghouse Charlotte, North Carolina Apparatus Repair Plant.

The basis for Petitioner's suggestion that the Court of Appeals should be reversed and certiorari be granted in this case is the factually mistaken assumption that the Board neglected to find that the IUE's historic multi-plant bargain-unit of Westinghouse employees was a "unit appropriate for collective bargaining" under Section 9(b) of the NLRA,[1] the legally erroneous assertion

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[1] Insistence upon this argument flies squarely in the face of the Board's detailed repeated reiteration of its reasoning for finding that the IUE represented a single multi-plant unit under Section 9(b) of the Act, which encompassed the employees of the Charlotte

that in reviewing the Board's appropriate unit finding below the Court of Appeals has not considered the right of employees to refrain from engaging in Section 7 activity, and that this Court go beyond the limitations of the present case and conduct a "long overdue" plenary review of the Board's administration of the Act and the policies which have followed the landmark ruling in *Pittsburgh Plate Glass Company* v. *NLRB,* 313 U.S. 146 (1941).

On the contrary, as the Court of Appeals summarily found,[2] the Board's decisions below rested upon the substantial evidence adduced in this particular case, and well-established legal precedent which is entirely consistent with prior decisions of this Court and those of various Circuit courts. As the Petition raises no substantial constitutional, statutory or procedural questions, and involves uniquely limited factual circumstances, it should be denied.

(1) The History Of The IUE-Westinghouse National Collective Bargaining Relationship

The crux of Petitioner's position is a challenge to the Board's findings that the appropriate collective bargaining unit of IUE-Westinghouse employees is a

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Apparatus Repair Plant, in *Westinghouse Electric Corporation and IUE,* 238 NLRB No. 102 (Petitioner's Appendix D, pp. 18(a)-19(a) and particularly p. 23(a)-24(a)); 240 NLRB No. 106 (Petitioner's Appendix E, pp. 32(a)-33(a)). These challenged decisions each cited and readopted the Board's detailed explanation for finding the IUE's single multi-plant unit of Westinghouse employees was an appropriate unit for collective bargaining in *Westinghouse Electric Corporation and Robert Hurtt and IUE,* 227 NLRB 1932 (1977), (Petitioner's Appendix C, pp. 7(a)-14(a)).

[2] The Court of Appeal's *Per Curiam* enforcement of the Board's Orders is in Petitioner's Appendix A, 1(a)-3(a); and the denial of Westinghouse's Petition for Rehearing *en banc,* is reproduced in Petitioner's Appendix B, p. 4(a)-5(a).

single multi-plant unit. The Board's decision, reaffirming the IUE's historic, single multi-plant bargaining unit, was the result of extensive evidentiary hearings arising from a decertification petition filed by a handful of employees at the Westinghouse Charlotte Apparatus Repair Plant.[3]

Since 1950, the IUE has had a National Agreement with Westinghouse broadly governing the wages, hours and conditions of employment of those employed in a growing number of Westinghouse facilities across the United States (Joint Appendix B 180-184, submitted below). This National Agreement has been periodically supplemented in National negotiations, has been, to a limited extent, locally supplemented at many IUE-Westinghouse plants[4] and has remained continuously in effect since 1950. (A.442)

The IUE-Westinghouse National Agreement not only provides for the automatic inclusion of bargaining units subsequently certified by the Board,[5] but sets the

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[3] *Westinghouse Electric Corp. and IUE,* 227 NLRB 1932 (1977) (Petitioner's Appendix C).

[4] Not all IUE locations negotiate Local Supplements (A.482) which generally deal with work schedules, reclassification of specific jobs, lay-off and recall procedures, overtime distribution, details of the grievance procedure, seniority units, etc. (B. 85-96; A.228-233). No Local supplement may conflict with the provisions of the National Agreement (A.441), and they are all subject to approval of the International Union's IUE-Westinghouse Conference Board. Once included in the National Agreement, the parties have agreed that a Local cannot terminate or remove itself from the coverage of that Agreement.

[5] See, B.207, 76, 142. Westinghouse's contention that the inclusion of new units is not automatic was explicitly rejected by the Board in *Westinghouse Electric Corp. and IUE, 224 NLRB No. 123 (1970),* and the Court of Appeals for the Fourth Circuit in a *Per Curiam* opinion in *NLRB* v. *Westinghouse Electric Corp.,* Docket No. 77-1306 (4th Cir. March 13, 1978).

basic terms and conditions of employment for the more than 20,000 IUE-represented workers.

The National Agreement establishes general wage increases and wage policies, national negotiating procedures, the grievance and arbitration procedure, check-off of union dues and union security, lock out protections and the right of IUE Locals to strike upon approval of the IUE-Westinghouse Conference Board, basic work week, overtime premiums, holidays and vacations, role of seniority in lay-off, recall and upgrading, leaves of absence, and the procedures for modifying or terminating the National Agreement and its Local Supplements. (B.79-110). The National Agreement incorporates a pension and insurance agreement which establishes uniform benefits and all other aspects of the pension and insurance programs. (B.127-141).

Since 1950, the IUE-Westinghouse National Agreement has been centrally negotiated and administered by the IUE-Westinghouse Conference Board, which consists of all IUE-represented Westinghouse locations and is staffed by full-time elected officers and employees. The central role of the Conference Board and its Negotiating Committee is not only contractually recognized, but the Conference Board meets with the corresponding Westinghouse Corporate industrial relations staff on a day-to-day basis to administer the National Agreement and Local Supplements. Between 1950 and 1976, the Conference Board processed approximately 18,000 grievances (A. 481) and arbitrated hundreds of others (A. 435) on behalf of all locations represented by the IUE. The Conference Board has the ultimate respon-

sibility for the negotiation of the National Agreement and the Local Supplements.[6]

Westinghouse's control of labor relations is equally centralized, and all phases of negotiations, contract administration, and pension and insurance administration is standardized and directed from Corporate headquarters in Pittsburgh. (A.131, 191, 231, 337-338, 463, 477 and 590).

Since 1950, the IUE's multi-plant unit has grown from twenty-two plants to more than forty, although some locations have been dropped because of closings, or sale,[7] and reference to these units was removed from the National Agreement. Over the past thirty years, the IUE has never agreed to the exclusion of any IUE-represented Westinghouse location from the National Agreement (A.464), and no unit has been eliminated by decertification or voluntary withdrawal. (A. 210-212, 464). During this period, the Board has routinely ordered elections at Westinghouse Plants not represented by the IUE, and, when certified, these locations have been included in the recognition provisions of the National Agreement and incorporated into the scope of the IUE's national bargaining and contract administration.[8]

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[6] Conference Board representatives led the 1975 negotiations which led to the Local Supplement covering the Charlotte location (A.133). Typically, Westinghouse was represented in these meetings by a Corporate Labor Relations representative from Pittsburgh. (B.122).

[7] See, for example *White-Westinghouse Corp., Division of White Consolidated Industries Inc.* and *IUE,* 220 NLRB 667 (1977); *enf'd sub. nom. IUE* v. *NLRB,* 604 F.2d 639 (D.C. Cir. 1979).

[8] Petitioner's reference (P. 5-6) to the Board's prior rejection of the IUE's multi-plant unit is singularly incorrect. The 1954 petition sought an election in plants represented both by IUE and by UE.

(2) The Certification Of The IUE At The Charlotte Apparatus Repair Plant And Westinghouse's Withdrawal Of Recognition And Repudiation Of The National Agreement And Local Supplement

After the IUE was chosen in a Board-sponsored election[9] as the exclusive collective bargaining representative of the production and maintenance employees at the Charlotte Apparatus Repair Plant, both parties agreed to include the Charlotte location within the IUE National Agreement.[10] Subsequently, IUE Local 186 was established by the International Union for Charlotte employees, and a Local Supplement was negotiated pertaining to specific conditions at the Charlotte Plant. This Local Supplement has never been terminated and has remained in effect to this date.[11]

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[9] At several points, the Petition claims that the Charlotte employees were told ". . .they could decertify the union later if they wanted to" (Petition, p. 7, footnote 3; p. 23-24, fn. 15.) The Board rejected this contention in finding that the National Agreement was widely distributed to employees during the campaign, and that coverage of Charlotte employees under that Agreement was a key element in the organizational drive; and further found that IUE organizers had stressed the *inclusion* of Charlotte workers in the multi-plant unit as a source of protection and strength. Moreover, the employee testimony Petitioner relies upon in this regard was extremely ambiguous, as employees were uncertain as to whether their "impressions" that they could "get-out" referred to union membership and check-offs or decertification. (A. 595-596, 602).

[10] Charlotte remained in the IUE National Agreement after the 1976 negotiations. The Company agreed to include it under the scope of the 1976-1979 Agreement even after the decertification petition was filed, thereby contractually agreeing to recognize the IUE. Moreover, in the 1976 National negotiations, a special wage adjustment ranging from 5¢ to 50¢ per hour was negotiated to cover 36 of the 41 employees at the Charlotte Plant. (A-161; B. 939).

[11] The Petition claims that the IUE was "dormant" at the Charlotte Plant during 1977. (Petition, p. 9-10, fn 5) and, again,

When Westinghouse received a letter dated December 20, 1977 from the International Union filing five grievances and submitting dues deduction authorization cards, the Company informed the Union that it would no longer recognize the IUE. (A.38, 51-52.) Since that time, Westinghouse has refused to formally bargain with the IUE and its Local 186, and has refused to honor the terms and conditions of the IUE-National Agreement or the Local Supplement thereto at the Charlotte Apparatus Repair Plant. The unfair labor practice proceedings which are before this Court were initiated as a result of Westinghouse's actions.

(3) The Findings Of The National Labor Relations Board In The Cases Enforced By The Fourth Circuit.

In its Decisions and Orders in *Westinghouse Electric Corp., and IUE,* 238 NLRB #102 and 240 NLRB #106, The Board found that Westinghouse violated its duty to bargain with the IUE by committing multiple violations of Sections 8(a)(1) and (5) of the Act beginning in January, 1978 including: (1) refusing to comply with and honor various terms of the existing IUE-Westinghouse National Agreement and the Local Supplement applicable to the Charlotte Apparatus Repair Plant (A. 118); (2) withdrawing recognition from the IUE in January, 1978 (A.94); and (3) unilaterally in-

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misstates the record. Evidence submitted by Westinghouse in the Court below showed that: (1) the Union met with Local management in February, 1977 and received a copy of the Charlotte seniority list; (2) in March, 1977 an International representative met with the Charlotte Plant Manager and succeeded in reversing the discharge of a Westinghouse employee; and, (3) in July, 1977 another grievance was raised over a three-day suspension, and a meeting with the Plant Manager again occurred. (A. 39-42).

stituting a second shift operation at the Charlotte Plant without notification to or bargining with the IUE. (A.118) In support of these conclusions, the Board further found that Westinghouse and the IUE had, on July 20, 1976, renegotiated the National Agreement which had been in effect between the parties since 1950, and that the 1976 Supplement extended without interruption the Local Supplement negotiated for the Charlotte Plant in 1975. Consequently, the Company's admitted refusals to accept grievances filed by the Union, refusals to honor dues check-off authorizations executed by Charlotte employees, and unilateral establishment of a second shift operation, were all held to be violations of applicable collective-bargaining Agreements and Section 8(a)(1) and (5) of the Act. Moreover, the Board found that Westinghouse had illegally withdrawn recognition from the IUE in January, 1978, continued to refuse to recognize and bargain with the Union thereafter, even though the IUE was and has continued to be the exclusive collective-bargaining representative of a single multi-plant unit of all IUE-represented Westinghouse locations covered by the National Agreement, including the Charlotte Apparatus Repair Plant.

The Petition asks this Court to grant review of the enforcement of these Board orders by the Court of Appeals for the Fourth Circuit.

REASONS FOR DENYING THE WRIT

This Court has frequently emphasized that the Board has broad discretion in determining whether a unit is appropriate for collective-bargaining purposes under Section 9(b) of the Act. In this case, the Court of Appeals correctly found that the Board's decision in the unfair labor practice proceeding rested upon the

substantial weight of virtually uncontested evidence, and that the Board's underlying conclusion that the Charlotte location had been absorbed or merged into the IUE's historic single multi-plant bargaining unit was supported by the record and consistent Board and judicial precedent.

As the Petition fails to specify any appropriate rationale for this Court's review, given the Board's sound exercise of its discretion as well as the consistency of the Court of Appeals' enforcement with prior Board and judicial holdings, and fails to justify extraordinary exercise of this Court's plenary review of the Board's 40 year long practice of sanctioning multi-plant units, it should be denied.

POINT I

The Board Has Correctly Exercised Its Broad Discretion In Determining That The Unit Appropriate For Collective-Bargaining Is A Single Multi-Plant Unit

This Court has frequently emphasized the broad discretion Congress gave the Board in making bargaining unit determinations:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the deci-

> sion in question does not do so. That settled, our power is at an end."

Packard Motor Car Co. v. *NLRB,* 330 U.S. 485, 491-92 (1947); *Accord, South Prairie Construction Co.* v. *Local 627, IUOE,* 425 U.S. 800, 804, 807 (1976). In deferring to the Board's expertise in its unit determinations, the Court has further held that,

> ". . . the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining"

Pittsburgh Plate Glass Co. v. *NLRB,* 313 U.S. 146, 165 (1941); and has required the Board to articulate substantial reasons for its unit determinations. *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438 (1965); *NLRB* v. *Purity Food Stores, Inc.,* 376 F.2d 497, 501 (1st Cir. 1967); *cert. den'd* 389 U.S. 959 (1967), Cf. *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349 (1953).

In the present case the Board has clearly, deliberately and forcefully elaborated upon the factual and legal basis for its finding that the Charlotte Plant was merged into the IUE's historic, single multi-plant bargaining unit of Westinghouse employees, first in the underlying representation case and then again in the unfair labor practice proceeding.

In determining that the IUE represents a single multi-plant bargaining unit, the Board applied criteria established by this Court almost 40 years ago in *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* and, in similar factual circumstances, when the Board has found the necessary facts to justify a multi-plant or multi-location bargaining unit determination, these criteria have been solidly reaffirmed by this Court in refusing to review the Board's unit findings. Cf. *Libbey Owens-Ford Co.* v.

NLRB, 495 F.2d 1195 (3rd Cir. 1974); *cert. den'd* 417 U.S. 998 (1974); *Primrose Super Market of Salem, Inc.,* v. *NLRB,* 353 F.2d 675 (1st Cir. 1974); *cert. den'd* 383 U.S. 830 (1965). As the Board's initial unit determination was fully litigated in the representation proceeding, and was consistent with applicable precedent and fully supported by the facts, the Court of Appeals was correct in deferring to it and in enforcing the Board's unfair labor practice findings.

Implicit in each unit determination made by the Board is a balancing of Section 7 rights of individual employees with the primary policy of encouraging more efficient collective bargaining. *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, 268-269 (1964). From the Board's earliest multi-plant finding in *Pittsburgh Plate Glass Co.* v. *NLRB, supra.* at 150, the desires of some smaller groups of employees were overridden to carry out the Board's legislatively-imposed duty to foster stability in labor relations. The Board's multi-plant determinations certainly have no more adverse impact upon Section 7 rights of employees to refrain from engaging in union activity by filing a decertification petition[12] than the approval of multi-employer units (Cf. *NLRB* v. *Strong,* 393 U.S. 357 (1968)), the denial of craft severance units,[13] the Board's refusal to hold department elections in unorganized plants, or the accre-

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[12] The perversity of Westinghouse's pious and disingenuous concern for individual rights was demonstrated in this case by the fact that Petitioner only refused to recognize the IUE after it was faced with substantial growth of support for the Union through sharp increase in Section 7 activity and attempts to enforce an existing collective bargaining Agreement.

[13] See, *Mallinckrodt Chemical Works,* 162 NLRB 387 (1966).

tion of groups of employees to larger, pre-existing units without elections, *Westinghouse Electric Corp.* v. *NLRB,* 440 F.2d 7, 11 (2nd Cir. 1971); *cert. den'd* 404 U.S. 853 (1971). If one adopts the Petitioner's view, as we cannot, in all of these areas of Board action Section 7 rights of employees are "extinguished" by unit determinations. Consequently, the "plenary review" Petitioner seeks on behalf of a handful of Charlotte employees amounts to no less than a demand for sweeping judicial reordering of the Board's well-settled policies, a nullification of the careful balance which the Board has struck through hundreds of decisions and years of this Court's guidance, to the ultimate detriment of the country's labor stability and the rights of millions of American workers who benefit from sound, stabilized bargaining relationships.

The Court of Appeals wisely rejected this proposition and, for these same reasons, we submit that this Court should deny Westinghouse's self-interested attempt to reverse forty years of administrative and judicial precedent, and nullify its thirty years of national collective bargaining with the IUE.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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